IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTER PATENT APPEAL NO.19 OF 1992

Arun Laxmanrao Navalkar of Bombay
Indian Hindu Inhabitant,
Ag about 52 years, permanently
residing at Navalkar House, 2nd floor,
159, Khadilkar Road, Girgaum,
Bombay 400 004.
Presently residing at
C/o.Y.M.Navalkar, Villa Bella View
Avantikabai Gokhale Street,
Bombay 400 004. ...Appellant

Vs.

Meena Arun Navalkar of Bombay
Hindu Inhabitant, age about 45 years
Residing at C/o. Arun Laxmanrao
Navalkar, Navalkar House, 2nd floor,
159, Khadilkar Road, Girgaum,
Bombay-400 004. ...Respondent

Mr.P.M.Patwardhan for Appellant
Mr. V.Z. Kankaria for Respondent

AND

LETTER PATENT APPEAL NO.20 OF 1992

Meena Arun Nawalkar
Residing at Nawalkar House
159 Khadilkar Road, Girgaum
Bombay – 400 004. ...Appellant

Vs.

Arun Laxmanrao Nawalkar
Residing at Nawalkar House,
159, Khadilkar Road, Girgaum
Bombay – 400 004. ...Respondent

Mr.V.Z.Kankaria for Appellant
Mr. P.M.Patwardhan for Respondent

CORAM : R.M.S.KHANDEPARKAR &
SMT. ROSHAN DALVI, JJ.

RESERVED ON : 16TH MARCH, 2006
PRONOUNCED ON:12TH APRIL, 2006

JUDGMENT (PER SMT. ROSHAN DALVI, J.)

1. The parties are husband and wife. Their marital relationship began in January 1981 and ended in July 1981 when they separated. During the time that they were together they lived at Girgaum which was their matrimonial home being a family bungalow of ground plus 2 upper floors. It was a joint family property in which they lived with 2 brothers and 2 cousins of husband. They used 2 rooms and a bath on the second floor, and the common kitchen (mess) and hall for visitors. This lis began in 1984 and has left the parties as they were 22 years ago.

2. The wife separated and sued the husband for

maintenance. The husband sued her for nullity of their marriage under Section 11 of the Hindu Marriage Act on the ground of their relationship being sapinda relationship, in the alternative for divorce on the ground of cruelty, desertion and schrezophrenia under Section 13(1)(ia) and 13(1)(iii) of the Hindu Marriage Act. The husband also sued for an injunction restraining the wife from coming into the matrimonial home which was his joint family property.

3. The Additional Principal Judge of the Bombay City Civil and Sessions Court decreed the husband's petition being MJ Petition No.980 of 1984 on 29th January 1988. He declared the marriage to be null and void and granted him a decree of divorce on the ground of cruelty as well as an injunction restraining her from entering upon the joint family property of the husband. However, he directed him to pay costs of the Petition fixed at Rs.3000/- .

4. The First Appeal from the said judgment being F.A.No.1464 of 1988 came to be disposed of by the learned Single Judge by his judgment and order dated 15th March 1991 setting aside the decree of nullity of marriage as well as the decree of divorce as also the

order of injunction and instead granting a decree of judicial separation under Section 10 of the Hindu Marriage Act. The order directed the husband to pay the costs of the Appeal fixed at Rs.5000/- in addition to the costs granted by the trial Court.

5. Both the husband and the wife have been aggrieved by the said order and have filed their separate appeals challenging part of the said order in First Appeal passed by the learned Single Judge. The husband has challenged the judgment setting aside the decree of nullity of his marriage, the decree of divorce as also the order of injunction. The wife has challenged the decree of judicial separation which was not even claimed by her. The above L.P.As. are accordingly filed by both the husband and the wife.

6. It would be apt to first consider the decree of nullity claimed by the husband under Section 11 of the Hindu Marriage Act. The relationship of the parties is admitted. They come from a common ancestor one Moroba who had one son Laxman and one daughter Champubai. The husband is the son of Laxman. The wife is the daughter of Champubai's son. Upon this admitted relationship the husband claims that they are

sapindas of one another. The wife claims that they are not. The sapinda relationship defined under Section 3 (f) and the prohibited relationship under Section 3(a) of Hindu Marriage Act runs thus :

"3.Definitions- In this Act, unless the context otherwise requires,-

" 3. (f) (i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth(inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them;

7. In Section 3(f) of the Hindu Marriage Act read with prohibited relationship under Section 3(a) of the Hindu Marriage Act show that the parties must be

within 5 generations of lineage from common ancestor through the male ascent. The ascent for both the parties are their respective fathers. Hence, their lineage is therefore male ascent. The wife however, claims that the sapinda relationship is not established as their lineage is intervened by her grand mother who is the husband's parental aunt. However, in the definition of sapinda relationship any breakage of the relationship by such intervening is not contemplated. The parties have a common lineal ascendant (ancestor) Moroba within 5 generations of each of them. The parties are therefore in sapinda relationship.

8. The provisions of Section 5(v) r/w. Section 3(f) of the Hindu Marriage Act shows that their marriage would be void unless there is a custom in their community to the contrary.

9. Section 5 of the Hindu Marriage Act runs thus :

"5. Conditions for a Hindu marriage – A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind ; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of (twenty-one years) and the bride, the age of (eighteen years) at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

10. It will have to be seen whether there is any custom in the community to which the parties belong allowing or enjoining marriage between parties without sapinda relationship and whether there have been (several) such marriages over a period of time which have been performed and are accepted by the community.

11. It is elementary that the onus of proving such a custom would necessarily lie on the party propounding it. What is the burden of proof and how the burden of proof of a given fact is to be discharged under Sections 101,102 & 103 of the Indian Evidence Act is thus:

"Section 101 – Burden of proof – Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence

of any fact, it is said that the burden of proof lies on that person.

Section 102 - On whom burden of proof lies – The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103 – Burden of proof as to particular fact – The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shll lie on any particular person."

12. Consequently in this case it is for the husband to prove sapinda relationship. It is for the wife to prove that there is a custom allowing marriages amongst sapindas in their community. The relationship of the parties being admitted, sapinda relationship need not be proved. The custom to the contrary is required to be proved.

13. The trial Court considered the onus as above. The learned single Judge however, held that it was for the husband to discharge the onus that there was no

custom of marriages within sapinda relationship in their community and that since he failed to discharge such a negative onus, his claim to the decree of nullity must fail. It is contended on behalf of the husband by Mr. Patwardhan that no party can discharge a negative onus and hence calling upon the husband to prove lack of custom results in failure of justice.

14. Section 5(v) of the Hindu Marriage Act has indeed not only laid down merely that the marriage of the parties in sapinda relationship is void. It lays down that it would only be void unless there was a custom to the contrary. It is in view of such phraseology that the learned single Judge has held that not only must the party propounding such a relationship to show such relationship but further show that there was no custom to the contrary since the said sub-section itself provides for the prohibition of the marriage only if such a custom within the community does not exist. However, if the Subsection is so read, the onus would be discharged only by the assertion of the negative fact that there is no such custom within the parties community. No specific instances of marriages not within prohibited relationship could be set out.

15. Hence, it is for the party, who claims such a custom to be existing, to show it by specific illustrations. In fact the wife has actually attempted to show as many as 9 instances of couples in their community which are stated to be in sapinda relationship during the trial to discharge such onus. It will have to be seen whether upon such illustrations the marriage of those parties are actually shown to be within sapinda relationship and if shown whether those instances would suffice to prove such a custom.

16. It is settled law that any custom, which one of the sources of the whole Hindu law, is characterized by its continuity, longevity and uninterruptedness. The instances of such custom must therefore, be over a long period of time, occurring at regular intervals without leaving the span of time without such illustrations. Such custom must be shown to exist and continue to exist before and after the parties' marriage. It must further be shown to be accepted by the community.

17. It would be apt to first consider the specific illustrations of various marriages shown by the wife during the course of the cross examination of the

husband as well as in her own examination-in-chief. The illustrations set out by the wife are admitted by the husband. Hence, the evidence led by the wife of 2 other witnesses, one of whom claimed to be an expert, having written a book interalia on such custom and the another who also had knowledge of such custom is therefore largely redundant. Similarly the evidence led by the husband of his 2 brothers and one cousin who were examined on his behalf which shows that they knew those parties as belonging to their community and most of them has also having been married to one another is rather unnecessary to consider.

18. A reading of the evidence shows the following parties bearing the admitted relationship mentioned against them:

Sr.No.	Parties name	Relationship
1.	Vimal Shyamrao Nawalkar Vinayak Narayan Raj	Maternal uncle's daughter
2.	Shaila Mehta Satish Mehta	Maternal uncle's daughter

3. Champa Vasant Mehta — Maternal uncle's daughter
Harischandra Bhagwantrao
Ovalekar

4. Manorama Sitaram Nayak — Maternal uncle's daughter
Yeshwant Shankar
Paralkar

5. Vimal Gajanan Patil — Sagotras
Bhal Shrikrishna Patil

6. Kamal Bhkobha Paralkar — Sagotras
Pyarelal Shyamrao Paralkar

7. Ujwala and Vinod — Sagotras

8. Sadhana Pathare — Sadhana is Nitin's father's sisters' daughter
Nitin Chandrakant Pansare — Nitin is her mother's brothers' son (maternal uncle's son)

(this relationship is the converse of the relationship between the Petitioner and the Respondent) (sapindas)

9.	Shaila Kamlakar Raj (Rath) Vijay Atmaram Paralkar	Shaila is Vijay's father's maternal cousin Vijay is Shaila's mother's uncle's son

(this relationship is similar to that of the Petitioner and the Respondent – Sapindas).

19. It will have to be seen from the above statement whether the custom propounded by the wife can be taken to be proved. The aforesaid relationships are admitted by both the parties. It may only be mentioned that the 2 witnesses of the husband, his 2 brothers being p.w. 3 and 4, have deposed that there is no such custom in their community and that the relationship of certain parties is not known to them though the fact that those parties are couples, are known to them. The evidence of the witnesses on behalf of the wife being R/W. 5 and 6 who have been examined essentially as experts have not shown any positive assertion that there is acceptance of such custom in their community. They have also shown no knowledge about certain specific relationships amongst

the aforesaid couples.

20. The aforesaid statement shows the relationship of only one couple at serial no.9 exactly like that of the husband and wife in this case. The couple at serial no.8 shows exactly the converse relationship though that would be a sapinda relationship. 3 of these couples at serial nos.5,6 & 7 are shown to be sagotras which is different from a sapinda relationship. 4 of these couples at serial nos.1,2,3 & 4 show the marriage of the husband with his “mama's” daughter which is a relationship specifically accepted amongst Hindus. One couple at serial no.8 is the marriage of a wife with her “mama's” son, converse of the accepted Hindu custom and which can be taken to be a sapinda relationship, otherwise prohibited.

21. The wife can therefore be taken to have shown at best the marriage of 2 couples in their community within sapinda relationship.

22. The years of their marriage are not shown hence, the span of time to show the existence of the custom is not known. The custom propounded by her therefore, cannot be taken to have the attribute of either

continuity or longevity, since the lapse of time of years between the marriages of these parties is not shown. The factum of uninterruptedness of the custom is also not made out. Aside from showing the factum of the marriages between 2 parties in sapinda relationship, the fact that it was accepted by the community as a whole is also not made out by a positive assertion. It may at best be taken that since these parties have admittedly married and continued within the community, no rejection of their marriage having been shown by the community on the part of the husband by his positive evidence, the implied acceptance may be made out. To see whether such evidence is sufficient to prove the custom by the party who propounds it, it would be useful to consider the series of judgments on the aspect of proof of custom as a source of Hindu law. The earliest of such judgments is in the case of Mirza Raja Pushpavathi Vijayaram Gajapathi Raj Manne Sultan Bahadur and others Vs. Sri Pushavathi Visweswar Gajapathiraj Rajkumar of Vizianagram and others reported in AIR 1964 SC 118 (Raja) in which the family custom of impartibility of estate relating to movable properties viz. Jewelry, in case of Rajas was considered. Following the decision of Privy Council in the case of Shiba Prasad Vs. Rani

Prayag Kumari reported in AIR 1932, P.C. 216. It was held that only one of the 4 rights of a joint Hindu family namely the right of survivorship was available in case of an impartible estate. Whether by custom in the family such a right to an impartible estate extended to the family jewelry was considered in that case. It was held in para 26 at page 130 that :-

" But apart from this technical aspect of the matter, we must have regard to the attitude adopted by the parties and their course of conduct at the relevant time when we are dealing with the question of family custom."

It was further observed that :-

" *In the matter of the proof of family custom, it is not the technicalities of the law that would prevail but the evidence of conduct which unambiguously proves that the parties wanted to continue the old custom.* **"**

23. The case of Siromani and another Vs. Hemkumar and others reported in AIR 1968 S C 1299 was the case in which the custom of Jethansi was propounded. That custom was that the eldest son received a larger share of

his father's property at the time of partition. An unequal partition of ancestral or joint properties was from earlier times condemned. Hence, it was held that custom in a particular community of giving the eldest son greater share in the property of his father on partition had to be proved. In para 7 of that judgment whilst rejecting that the custom pleaded had been established, it is observed that :

> *" It is well established that a custom must be proved to be ancient, certain and reasonable if it is to be recognised and acted upon by Courts of law; and being in derogation of the general rules of law the custom must be construed strictly:"*

24. In that case the witness who was examined to prove the custom deposed that he was not present at the time of partition which was shown to have been effected. He deposed that there was no fixed custom of Jethansi in that community. He gave an instance of partition to show the custom of Jethansi without any written document of partition. It was held, relying upon the Privy Council decision in the case of Hur Purshad Vs. Sheo Dyal (1876-77) `8 Ind. App 259 at page 295 (PC), that such evidence was not sufficient to

prove such custom.

25. From the law enunciated under the aforesaid cases, the evidence produced by the wife in this case is required to be considered. The specific custom propounded by her that sapinda relationship in marriage is allowed and accepted in her community is not proved.

26. It has been held in the impugned judgment that the onus lies on the husband to prove lack of custom to this effect. We understand that the learned Single Judge who set aside the reasoning and the order of the learned trial Judge on this aspect and held that the husband was to prove lack of custom was guided by the reading of Section 5(v) of the Hindu Marriage Act by the learned Judge. Since the said Sub-section runs thus :

"Section 5(v) – the parties are not sapnidas of each other, <u>unless</u> the custom or usage governing each of them permits of a marriage between the two."

27. The reading of this Sub-section, as held in the

impugned judgment, cannot show that the marriage between two Hindus would be void, if the party propounding the voidability of the marriage shows not only that they are in sapinda relationship, but there is no custom in their community accepting such relationship in marriage. The reading of the Section in fact shows that sapinda relationship is the specific ground for voidability of marriage. Hence, it is not for the party seeking voidability to show lack of custom.

28. The onus as well as the standard of proof of a custom of the kind is not different from the proof of other customs. The question of pleading and proof of a custom has been considered in the case of Harihar Prasad Singh and others Vs. Balmiki Prasad Singh and others reported in AIR 1975 SC 733 (relying upon the earlier decision relating to the proof of custom in the case of Ramalakshmi Ammal Vs. Sivanatha Perumal (1872) 14 Moo India App,570, at page 585 (Privy Council) thus:-

> *"the plaintiffs to prove the existence of the custom and if they fail to do so they cannot succeed on the basis that the defendants did not succeed in proving that the custom did not*

exist."

29. It was observed that instances to prove the family custom, may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. Consequently it can be seen that for proving the custom in the community more instances are required to be shown.

30. However, the general law with regard to the proof of custom following the Privy Council decision in the case of Ramalakshmi Ammal Vs. Sivanatha Perumal (supra) held in the case of Harihar Prasad V. Balmiki Prasad is thus :

" It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

31. It is therefore, seen that the learned trial Judge has correctly considered the factum of the custom, if any, of marriages in sapinda relationship in the community of the husband and the wife upon the evidence rightly led by the wife to prove such custom. He correctly found it inadequate and insufficient of the standard of proof required. The learned single Judge, however, incorrectly concluded that the very onus of proof that there was no such custom in their community was on the husband.

32. That being so we need not advert to the other aspects of the relationship between the parties with regard to the claim of the husband for divorce on the ground of cruelty, desertion and schrezophrenia, the marriage between the parties being itself void under Section r/w. Section 5(v) of the Hindu Marriage Act.

33. The only aspect that remains to be considered is the contention of the wife that she would be entitled to remain and reside in the matrimonial home of the parties where they resided together for a period of about 6 months, 22 years ago.

34. The husband's case of restraining his wife from

entering upon the premises granted by the trial Court has been upset by the learned Single Judge.

35. It may be mentioned that since the marriage of the parties itself is declared void, there would be no question of the wife exercising any right of residence in their matrimonial home. In fact she has not resided therein for the last 22 years.

36. In the circumstances the appeal is allowed.

37. The order of the learned single Judge dated 5th March, 1991 is set aside.

38. The marriage between the parties is declared null and void. The wife is restrained from entering into the matrimonial home at Nawalkar House, 159, Khadilkar Road, Girgaum, Bombay-400 004.

39. There shall be no order as to costs of this appeal.

(SMT. ROSHAN DALVI, J.) (R.M.S.KHANDEPARKAR, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION
LETTER PATENT APPEAL NO.19 OF 1992
Arun Laxmanrao Navalkar ...Appellant
Vs.
Meena Arun Navalkar ...Respondent

Mr.P.M.Patwardhan for Appellant
Mr. V.Z. Kankaria for Respondent

AND

LETTER PATENT APPEAL NO.20 OF 1992
Meena Arun Nawalkar ...Appellant
Vs.
Arun Laxmanrao Nawalkar ...Respondent

Mr.V.Z.Kankaria for Appellant
Mr. P.M.Patwardhan for Respondent

CORAM : R.M.S.KHANDEPARKAR &
SMT. ROSHAN DALVI, JJ.
DATE: 12TH APRIL, 2006

P.C.: After pronouncement of the judgment the learned advocate appearing for wife orally requested for stay of the order as far as it relates to the relief of injunction. Undisputedly during the pendency of the LPA there was no order of injunction against the wife. Considering the same the order to the extent it relates to the injunction against wife, the same is stayed for a period of 8 weeks.

(SMT. ROSHAN DALVI, J.) (R.M.S.KHANDEPARKAR, J.)